LIBRARY
SUPREME COURT, U. S.

FILED
MAR 29 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1279

AUTOMATIC RADIO MFG. CO., INC., and
AUTOMATIC RADIO SALES, INC., *Petitioners*

v.

FORD MOTOR CO., *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

WORTH ROWLEY
JOHN C. SCOTT
1730 Rhode Island Avenue, N.W.
Washington, D. C. 20036
Counsel for Petitioners

Of Counsel:

ROGER P. STOKEY
WALKER B. COMEGYS, JR.
GOODWIN, PROCTER & HOAR
ENGLANDER, ENGLANDER & ENGLANDER
Boston, Mass.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	2
Reasons for granting the writ	9
Conclusion	17
Appendices:	
A. Statutes	1a
B. Opinions and judgment below	4a

CITATIONS

CASES:

Automatic Radio Mfg. Co. v. Ford Motor Co., 242 F. Supp. 852, 853 (D. Mass. 1965)	6
Bateman v. Ford Motor Co., 302 F.2d 63 (3d Cir. 1962)	9, 10
Bergen Drug Co. v. Parke, Davis & Co., 307 F.2d 725 (3d Cir. 1962)	9, 10, 12
Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946)	13
Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738 (2d Cir. 1953)	9, 11, 12
Imperial Chemical Indus. Ltd. v. National Distillers & Chem. Corp., 354 F.2d 459 (2d Cir. 1965)	11
Klors, Inc. v. Broadway-Hale Stores, 359 U.S. 207, 211 (1959)	15
Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958)	13
Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co., 364 U.S. 656, 660 (1961)	15

	Page
Richfield Oil Corp. v. Karseal Corp., 271 F.2d 709 (9th Cir. 1959)	13
Times-Picayune Publ. Co. v. United States, 345 U.S. 594 (1953)	13
United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945)	13
United States v. Colgate & Co., 250 U.S. 300 (1919)	12
United States v. General Motors Acceptance Corp., 121 F.2d 376 (7th Cir. 1941), cert. denied 314 U.S. 618 (1941)	13
United States v. United Shoe Mach. Corp., No. 597, October Term, 1967	8

STATUTES:

Sherman Act, 26 Stat. 209; 69 Stat. 282, 15 U.S.C. 1, et seq.:	
Section 1, 15 U.S.C. 1	2
Section 2, 15 U.S.C. 2	2
Clayton Act, 38 Stat. 730, 15 U.S.C.:	
Section 3, 15 U.S.C. 14	2
Section 4, 15 U.S.C. 15	2, 3
Section 16, 15 U.S.C. 26	2, 3
Federal Judicial Code, 62 Stat. 928, 28 U.S.C. 1254(1)	2

MISCELLANEOUS:

DeFuniak, Requisites for Equitable Protection Against Torts, 37 Ky. L.J. 29, 35 (1948)	16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No.

AUTOMATIC RADIO MFG. CO., INC., and
AUTOMATIC RADIO SALES, INC., *Petitioners*

v.

FORD MOTOR CO., *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Automatic Radio Mfg. Co., Inc., and Automatic Radio Sales, Inc., petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit, entered in this case on March 5, 1968.

OPINIONS BELOW

The opinion of the court of appeals on the judgment sought to be reviewed here (App. B, *infra*, pp. 14a-20a) is not yet reported. The findings and opinion of the district court (App. B, *infra*, pp. 4a-13a) are reported at 272 F.Supp. 744.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 21a) was entered on March 5, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether, in a private antitrust suit, the district court may deny an interlocutory injunction against overt tied selling practices begun by the defendant after the suit was filed, when these practices are forcing the plaintiffs out of a major and traditional market in which they have long competed with defendant and are giving the defendant a complete, unchallenged monopoly in that market.

STATUTES INVOLVED

The statutory provisions involved are sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and sections 3, 4, and 16 of the Clayton Act, 15 U.S.C. §§ 14, 15, and 26. They are printed in Appendix A, pp. 1a-3a.

STATEMENT

Petitioners are a long established manufacturer of automobile radios and its sales subsidiary. Their principal product lines are custom automobile radios, i.e. radios designed and adapted for in-dash mounting on a particular model of automobile. Their complaint, originally filed on April 26, 1963, charges Ford Motor Company with monopolizing and restraining trade in custom automobile radios and with unlawful tied selling thereof, in violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and section 3 of the Clayton Act, 15 U.S.C. § 14. The complaint seeks treble damages and injunctive relief under sections

4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26. On September 20, 1967, the Massachusetts Federal District Court denied the petitioners' motion for a preliminary injunction to maintain the status quo pendente lite against certain anticompetitive marketing practices initiated by the defendant after the complaint was filed (Appellants' Record Appendix, p. 55*). On March 5, 1968, the court of appeals affirmed that denial.

Petitioners pioneered the custom automobile radio field, designing and marketing custom radios for in-dash mounting in new cars. Subsequently the automobile manufacturers began to market such radios themselves, in competition with petitioners. Because most custom automobile radios are sold to buyers of new cars and are installed before the cars are delivered, petitioners' only significant markets for their custom car radios consist of franchised dealers in new automobiles (Appellants' RA 61). These markets are particularly susceptible to control and domination by the automobile manufacturers, each of which now sells car radios to the automobile dealers it franchises (Appellants' RA 62). While petitioners sell custom car radios to dealers franchised by each of the automobile manufacturers, Ford dealers are petitioners' largest single market and constitute their only significant market for their most important group of products, i.e. radios designed and adapted for custom installation in the Ford line of cars.

Petitioners assert that Ford is and has been for some years using its economic power over its automobile dealers to exclude petitioners and to obtain a

---

* References to Appellants' Record Appendix to their court of appeals brief are hereinafter abbreviated as Appellants' RA.

monopoly in the sale of custom automobile radios to those dealers. Presently Ford's only competition on such sales is offered by petitioners and by another independent custom car radio manufacturer, Tenna Corporation of Cleveland, Ohio (Appellants' RA 64). Formerly this competition included Soundex Radio Corporation of Brockton, Massachusetts, but this company was bankrupted by the Ford marketing practices here in issue (Appellants' RA 65, 71).

Petitioners seek a preliminary injunction to preserve the status quo by restraining Ford from continuing a marketing practice, adopted by it after the suit was filed, which effectively compels its franchised dealers to obtain from Ford their requirements of custom radios for certain lines of cars, i.e., the practice of refusing to supply its dealers with those of its cars that are designed and adapted for custom radios unless the dealer orders the custom radio installed therein by Ford (Appellants' RA 55). This practice is seriously jeopardizing petitioners' own continued existence as competitors of Ford in the custom automobile radio field, is wholly excluding them from supplying custom radios for certain models of Ford-produced cars (Mercury and Custom Comet), and is substantially excluding them from supplying custom radios for other important models (Galaxie and Fairlane) (Appellants' RA 65, 68, 138). Similarly, the practice has excluded Tenna (Appellants' RA 69).

The injunction which the petitioners seek is a narrow one. In essence it would require Ford to furnish its dealers, when they so request, with the same automobile without factory-installed radio that the dealer would get from Ford had he ordered the automobile with a

factory-installed radio, namely an automobile ready, without modification, to receive a custom radio.

For many years, and until after this suit was filed, when an automobile was delivered by the automobile manufacturer to a dealer without a radio installed at the factory, the opening in the instrument panel designed to accommodate a radio was covered by a small piece of metal called a "knock-out plate." If the dealer wanted to install a radio, he simply removed the "knock-out plate" and installed the radio in the bared opening. However, in its 1965 Galaxie and Fairlane models first appearing in the fall of 1964, Ford placed a plastic cover about 27 inches wide over the entire instrument panel with holes in it for various dashboard gauges and instruments and, if a radio had been factory installed, for the dial, pushbuttons and knobs of the radio. For cars without factory-installed radios, the plastic dashboard cover was identical except that it had no holes for a radio. If a dealer wanted to install a radio, the entire dashboard cover had to be removed and replaced by one with holes in it for radio knobs and pushbuttons.

During the first seven months of the 1965 model year, Automatic Radio lost more than 70 percent of the business it had previously been doing in selling custom radios for Fairlane cars, and more than two-thirds of its business in selling radios for Galaxies (Appellants' RA 131, 138-139). At the same time, the number of Galaxies sold with factory-installed radios increased from 60.7 percent on 1964 models to 78.7 percent on 1965 models, and the number of Fairlanes with factory-installed radios increased from 56.0 percent to 70.2 percent, even though both figures had been declining dur-

ing the three preceding years. Accordingly, in 1965 petitioners sought, but were denied, a preliminary injunction against Ford's "practice of supplying to its dealers certain of its automobiles constructed without openings in the instrument panels for the installation of radios." (*Automatic Radio Mfg. Co.* v. *Ford Motor Co.*, 242 F. Supp. 852, 853 (D. Mass. 1965) (Appellants' RA 43)).

Since 1965 the anticompetitive impact of Ford's marketing practices upon petitioners has become more severe as they have been extended to additional lines of Ford's automobiles. On February 17, 1967, petitioners filed the preliminary injunction motion here in issue. For the immediate purposes of the present appeal, the sales practices in question are exemplified by Ford's marketing of its 1967 Galaxie, Fairlane, Deluxe Comet and Mercury models. Each of these models is offered to Ford dealers in two versions: one with an imperforate dashboard that will not accommodate a custom radio and the other with a dashboard designed and adapted to accommodate a custom radio. The version that will accommodate a custom radio is available to Ford dealers only when they buy a factory-installed radio from Ford. To remain in competition with Ford, petitioners have been obliged to have radio dashboards manufactured for them, so that they can be furnished free of charge to Ford dealers who buy petitioners' custom radios. Petitioners have not been able to obtain these dashboards, which are costly, in the first quarter of the Galaxie and Fairlane model years, nor indeed at all for the Mercury or Custom Comet models. Thus as a result of Ford's tied marketing practices they have been wholly debarred from the Mercury and Custom Comet markets, debarred from an important part of the sales season for the Galaxie and

Fairlane markets, and subjected to enhanced costs which have caused their dwindling sales of Galaxie and Fairlane custom car radios to be made at a serious out-of-pocket loss (Appellants' R.A. 64, 65, 66, 135). Moreover, they incur severe injury to their good will and reputation as suppliers of a complete line of custom automobile radios for new cars (Appellants' RA 128, 131, 138).

The district court agreed with petitioners that a car radio, even when installed at the automobile factory, remains a separate "product" and does not become a part of the automobile (Appellants' RA 156). The court of appeals did not disturb that finding of the district court and affirmed the denial of a preliminary injunction "on the narrow ground that Automatic has made no compelling case of immediate irreparable injury. Moreover, the allegations and affidavits are not such as to convince us of such a strong probability of success on the merits that we should apply a less stringent requirement of proof of irreparable injury."

In finding no immediate irreparable injury, the court of appeals subordinated the concept that the public has an interest in car radio competition. The court pointed to evidence "that, whatever the source of radios installed in Ford cars, the price of the radio to the consumer is the same." Acknowledging the possibility that a greater profit margin on radios would give Ford dealers more to "play with" in dickering with customers over price or trade-in, the court of appeals nonetheless gave scant weight to the public interest in preserving this competition. In so doing it ignored unchallenged evidence that petitioners' competition was responsible for reducing consumer prices in car radios (Appellants' RA 34-43, 138-139).

The court of appeals also characterized petitioners' public-injury argument as "unrealistic in failing to take into account the fact that Automatic, if successful on the merits, would be entitled to permanent injunctive relief which would permit competition to revive." Injunctive relief against monopolization, to be effective, must be timely. Like artificial respiration, the longer it is postponed, the less likely it is to be successful. And experience teaches that sweeping injunctive relief against an entrenched monopoly position is glacially slow and of limited effectiveness. See, for example, *United States* v. *United Shoe Machinery Corp.*, No. 597 on the appellate docket of this Court.

In rejecting the claim of irreparable injury to petitioners' business, the court of appeals also said that Automatic is not "a consumer-oriented enterprise" but one that competes for the custom of dealers "who, in turn, seek Automatic's product because it is a lower cost product, yielding them a greater profit." Therefore, the court reasoned, "the basic pricing situations strongly suggest that, should Automatic ultimately prevail on the merits, the status quo ante would be quickly restored to the extent that price advantage remained a critical consideration." By reason of Ford's intensified price competition petitioners already have been constrained to price their product at a level which now reflects a net loss to them. With Ford's superior ability to cut prices, and its demonstrated willingness to do so (Appellants' RA 34-43), it seems unlikely that price advantage can "remain a critical consideration" of sufficient economic force to re-establish petitioners in a market from which they have been excluded. Indeed, because petitioners are not a "consumer-oriented enterprise," but sell into a market dominated and controlled

by Ford, money damages cannot serve as adequate restitution for the good will lost to the petitioners by their Ford-imposed inability to serve Ford dealers as reliable, full-line suppliers of custom radios. With money damages, they can buy back neither their market position nor their good will, even if the dollar values of these items could be accurately computed and were amply reflected in damages. Ford would continue to possess the monopoly advantage it is gleaning by the post-complaint commercial aggression it is directing against the petitioners at a time when they are entitled to the protection of the law.

REASONS FOR GRANTING THE WRIT

1. A grant of certiorari herein will permit the Court to resolve a conflict among the circuits as to the irreparable-injury criteria to be applied in passing on motions for preliminary injunctions in private antitrust cases. The criteria applied by the First Circuit in the present case stand out in sharp contrast to those spelled out by the Court of Appeals for the Third Circuit in *Bergen Drug Co.* v. *Parke, Davis & Co.*, 307 F. 2d 725 (3d Cir. 1962) and in *Bateman* v. *Ford Motor Co.*, 302 F. 2d 63 (3d Cir. 1962), and by the Court of Appeals for the Second Circuit in *Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F. 2d 738 (2d Cir. 1953). All three cases were cited and relied upon by petitioners in the court of appeals.

A. The Third Circuit in *Bergen Drug* held that irreparable injury was shown when the plaintiff was barred from a limited market by defendant's post-complaint acts and would suffer loss of good will. As in this case, the plaintiff did not sell to a consumer market. It was

a wholesale druggist, selling to retail pharmacies. The Third Circuit was dealing with the adequacy of money damages to compensate for injury to good will. It held that money damages were inadequate, citing its earlier decision in *Bateman* v. *Ford Motor Co.*

The First Circuit's ruling of law is the reverse. It holds that when a plaintiff is barred from a market by defendant's post-complaint acts and suffers loss of good will he can be adequately compensated in money damages. The First Circuit was obviously mistaken when it tried to distinguish *Bergen Drug,* citing that case as involving a situation "where inability to supply 'a full line' of products causes the purchaser to shift his business permanently to other suppliers." Indeed, petitioners present a more compelling case for preliminary injunctive relief than did *Bergen Drug,* for the market in which petitioners must recover their competitive position is the franchised-dealer system over which Ford, the much larger competitor charged with monopolization, exercises overwhelming economic control. Obviously, therefore, in attempting to reconcile its conclusion with the holding in the *Bergen Drug* case, the First Circuit has in effect held that it is easier for an excluded competitor to recover its position as a single line supplier to a captive market like Ford's franchised dealer system than it is to recover competitive standing as a multi-line seller in a market which is not wholly dominated by any single supplier, let alone the second largest industrial enterprise in the United States.

B. There is also a conflict between the First and Third Circuits regarding the public interest in private antitrust actions. The Third Circuit in *Bergen Drug*

explained their importance as "a vehicle for serving not only the immediate interests of the litigants but the continuing interest of the public in a smoothly functioning and unobstructed system of commerce . . ." and held that the public interest factor "weighs heavily . . . in considering whether equity jurisdiction should be exercised." Here, in sharp contrast, the First Circuit sanctions at least temporary monopolization and risks permanent monopolization on the basis of its unverified, unsupported, speculative theory that petitioners may re-enter the market and that competition may be restored to the market at some unspecified date in the distant future, some time after a permanent injunction whose metes and bounds are unspecified, is ultimately entered.

In support of its action the First Circuit cited *Imperial Chem. Indus. Ltd.* v. *National Distillers & Chem. Corp.*, 354 F. 2d 459 (2d Cir. 1965). But that case did not involve any germane antitrust considerations whatever. It concerned only the special right of a business enterprise in its trade secrets. When the public interest in a competitive economy is involved, the Second Circuit, too, favors use of the preliminary injunction "as an equitable policing measure . . . to keep the parties, while the suit goes on, as far as possible in the respective positions they occupied when the suit began." *Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F. 2d 738, 742 (2d Cir. 1953).

C. Another principle spelled out by the Second Circuit in the *Hamilton-Benrus* case was: "To justify a temporary injunction it is not necessary that the plaintiff's right to a final decision, after a trial, be absolutely

certain, wholly without doubt; if the other elements are present (i.e., the balance of hardships tips decidedly toward plaintiff), it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation." In the present case, the First Circuit agreed that petitioners' claims are not "insubstantial and frivolous" but raise "substantial and novel" questions. Nevertheless, without pointing to any hardships a temporary injunction would create for Ford— and therefore prevent the "balance of hardships" from tipping toward plaintiffs—the First Circuit refused to order a halt to progressing monopolization until a "more deliberate investigation" can be made into the legality of the marketing practices being used to accomplish that monopolization. The right of plaintiffs in the present case to a final judgment is certainly no less certain than it was in the *Bergen Drug* and *Hamilton-Benrus* cases. The *Hamilton-Benrus* case was one of the first merger proceedings to arise under the 1950 amendments to section 7 of the Clayton Act and presented questions of first impression under those amendments. And in the *Bergen Drug* case the Third Circuit was faced with the then novel question whether the *Colgate* doctrine, 250 U.S. 300 (1919), which normally permits a businessman acting independently to exercise broad freedom in the choice of his customers, allows him to refuse to deal with those who bring antitrust treble-damage suits against him.

In the opinion of the First Circuit in the present case, no question is raised as to the legal sufficiency of the charges made in petitioners' complaint or as to the adequacy of the evidence of antitrust violation in the

affidavits and other documentary evidence submitted by petitioners in the district court.* Rather, the court of appeals refers only to "the substantial and novel question involving disputed evidence of motivation and causation of Ford's increase and Automatic's decline in sales." But proof of actual monopolization and anti-competitive tying arrangements need not include evidence of specific intent; a general intent to do the act resulting in monopolization or tying is enough. *United States* v. *Aluminum Co. of America,* 148 F. 2d 416 (2d Cir. 1945); *Times-Picayune Publ. Co.* v. *United States,* 345 U.S. 594 (1953); *Northern Pac. Ry. Co.* v. *United States,* 356 U.S. 1 (1958). And the uncontested facts of Ford's increase in radio sales with the adoption of new dashboard marketing practices and of petitioners' decline in sales are themselves the clear evidence of causation. "The jury could conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiff's business, and from the evidence of the decline in prices, profits, and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs." *Bigelow* v. *RKO Radio Pictures,* 327 U.S. 251 (1946). In *Richfield Oil Corp.* v. *Karseal Corp.,* 271 F. 2d 709 (9th Cir.

---

* Ford, with a monopoly of automobile sales to its franchised dealers, has used the leverage of that monopoly to achieve a monopoly position in sales of custom car radios to those dealers, and is seeking by its tied selling practice to achieve an even greater share of the market. Using such monopoly power to beget monopoly has long been outlawed. United States v. Griffith, 334 U.S. 100 (1948). Tied selling in such circumstances is illegal. United States v. General Motors Acceptance Corp., 121 F. 2d 376 (7th Cir. 1941), cert. denied 314 U.S. 618 (1941); Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958).

1959), the court agreed with a damage claimant's assertion that, "having shown the illegal restraint applied to its products" by a competing seller, "it had proved the causal connection between the defendant's wrongful act and the loss of revenue."

2. This Court has never defined the criteria to be applied by district judges in granting preliminary injunctions in private antitrust actions, and now should do so for the guidance of inferior federal courts. The present case dramatically illustrates the importance of maintaining the status quo pendente lite if private antitrust litigation is to be an important instrument of public policy rather than merely a salve for the wounds inflicted on the victims of anticompetitive conduct. According to the First Circuit, the element of speculation necessarily involved in a jury's determination of the amount of profits petitioners would have made but for Ford's wrongdoing is not a relevant factor in determining whether the continuing injury being inflicted upon petitioners during the litigation is irreparable, since "we have long since crossed the bridge of precision of proof of causation and extent of damages in antitrust cases." For the guidance of the federal courts, this Court should resolve this question whether damages that are speculative in amount can be considered an adequate remedy making it unnecessary to put a stop to continuing antitrust violations while some determination of damages is made by a jury. Speculation can work two ways; it does not necessarily advantage a plaintiff, for a jury can, when permitted to speculate, arrive at an inadequate verdict.

In addition, it is particularly important that the district courts be advised that the fact damages will be

trebled is not an element to be considered in determining whether the right to damages will provide adequate relief in an antitrust proceeding. Otherwise they may follow the First Circuit's ruling in this case with the result that the damage trebling policy adopted by Congress will be significantly weakened as an enforcement tool, and the Congressional dispensation of preliminary injunctive relief for private antitrust plaintiffs, as provided by section 16 of the Clayton Act, will be frustrated.

3. The court of appeals has fallen into error that should be corrected to avoid serious and unwarranted curtailment of the efficacy of private antitrust litigation to enforce the antitrust laws. When, as is the situation here, antitrust violations are rapidly creating a complete monopoly in a particular market, "Congress [has] determined its own criteria of public harm and it [is] not for the courts to decide whether in an individual case injury [has] actually occurred." *Klors, Inc.* v. *Broadway-Hale Stores,* 359 U.S. 207, 211 (1959); *Radiant Burners, Inc.* v. *Peoples Gas, Light & Coke Co.,* 364 U.S. 656, 660 (1961). Public injury is inherent in every day of progressing monopolization. This public injury is irreparable, for there is no way the final judgment obtained by the private plaintiff can restore, by some retroactive effect, the competition, the effective allocation of economic resources, and the price-suppressing rivalry to which the public is entitled during the long years it will take to litigate this private suit to final judgment. And the public will collect no damages for the injury it is sustaining. "In no civilized country should the jurisprudence insist that a wrong be allowed to happen and compensation sought thereafter rather than preventing the occurrence of the

wrong." DeFuniak, *Requisites for Equitable Protection Against Torts,* 37 Ky. L.J. 29, 35 (1948).

If the judgment below is not reversed, Ford's monopolization of car radio sales to its franchised dealers will destroy the relevant market itself. Without immediate preliminary relief, the monopolization practices under attack will bring an end to the purchase of radios by new-car dealers for installation by their service personnel. Statistics related to Ford dealers' radio purchases reveal that, even as this suit is being litigated, a rapid shift is being made to factory-installed radios; indeed, there is uncontroverted evidence, taken from Ford's own records (Appellants' RA 35), that Ford has been striving to discourage dealer installation of radios. Therefore, despite the district court's finding that a car radio is a separate product and not a part or accessory of the automobile itself, marketing practices are taking hold that are rapidly terminating all merchandising of car radios as products separate from the automobiles in which they are installed. In some models of cars, radios have become standard equipment. For all Ford models in which radios are not standard equipment, Ford dealers are apparently attempting to anticipate their customers' desires by ordering enough cars with factory-installed radios to fill the demands of all customers who want radios. It now appears likely that, by the time petitioners' right to a permanent injunction has been litigated, Ford's franchised dealers will have firmly established buying patterns oriented toward factory-installed radios, which a mere injunction against anticompetitive conduct cannot erase. And the court of appeals' explicit finding (App. B, p. 19a) that petitioners' custom car radio business is not a "consumer-oriented enterprise" shows

that petitioners cannot depend on appeals to the ultimate consumer to select dealer-installed radios.

The decision below, by permitting Ford during this litigation to complete the conversion of its franchised dealers to factory-installed car radios, will give each of the other automobile manufacturers an irresistible incentive to undertake a similar program. Coupled with the absence of any consumer orientation with the market for dealer-installed car radios and the overwhelming economic domination automobile manufacturers exercise over their franchisees, denial of immediate injunctive relief in this case means that competition in the marketing of car radios will disappear entirely. Moreover, a precedent will be set for conversion to full factory installation of other similar products manufactured for use in or on automobiles. Such is the monopolistic control automobile manufacturers exercise over their franchised-dealer marketing systems that they can readily establish themselves as the only substantial manufacturers not only of car radios but also of car air conditioners, cartridge tape players, luggage carriers, and other automobile appurtenances, in the sale of which there is now substantial independent competition.

CONCLUSION

Although this action has been pending since April 1963, no trial date has even yet been set despite petitioners' best efforts. In the meantime, Ford's custom car radio monopolization proceeds apace on the basis of anticompetitive practices adopted after petitioners' complaint was filed, and at the expense of petitioners' legitimate business interests. All the while, petitioners are being denied the protection of the courts that the

rules of the Second and Third Circuits would give them, and even the inadequate relief of money damages is not yet in sight. If this petition for a writ of certiorari be granted, petitioners can receive a substantial measure of relief long before this litigation is concluded. Accordingly, for the reasons hereinbefore set forth conformably with Rule 19 of the Revised Rules adopted June 12, 1967, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WORTH ROWLEY
JOHN C. SCOTT
1730 Rhode Island Avenue, N.W.
Washington, D. C. 20036

Counsel for Petitioners

Of Counsel:

ROGER P. STOKEY
WALKER B. COMEGYS, JR.
GOODWIN, PROCTER & HOAR
ENGLANDER, ENGLANDER & ENGLANDER

APPENDIX

APPENDIX A

Sherman Act

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: Provided, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which, bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any State, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the Act entitled "An Act to create a Federal Trade Commission, to define its power and duties, and for other purposes", approved September 26, 1914: Provided further, That the proceeding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.